12-1100-11143-2
(Court of Appeals # C7-97-1722)

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF CORRECTIONS

In the Matter of the Risk
Level Determination of C.M.

**ORDER DENYING MOTION
FOR STAY OF NOTIFICATION
PENDING APPEAL**

The above-entitled matter is before Administrative Law Judge Steve M. Mihalchick on the motion of C.M. for an Order staying community notification under Minn. Stat. § 244.052, pending appeal of the Order affirming his classification as a Risk Level III sex offender.

Jenneane Jansen, Assistant State Public Defender, Legal Advocacy Project, 2829 University Avenue SE, Suite 600, Minneapolis, Minnesota 55414, appeared on behalf of C.M.

Alan Held, Assistant Attorney General, Suite 900, 445 Minnesota Street, St. Paul, Minnesota 55101-2127, appeared on behalf of the End of Confinement Review Committee (ECRC) of the Minnesota Correction Facility of Lino Lakes.

Based upon the record herein and the reasons set forth in the following Memorandum, the Administrative Law Judge makes the following:

ORDER

The motion for a stay of community notification under Minn. Stat. § 244.052, is DENIED.

Dated this 24th day of October, 1997.

STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

On August 27, 1997, the Administrative Law Judge issued Findings of Fact, Conclusions of Law, and Order in this matter (the ALJ Order). The ALJ Order upheld the risk assessment determination of the ECRC that the appropriate risk level for C.M. was Risk Level III. C.M. appealed the ALJ Order to the Court of Appeals and the matter is now pending. It will likely be several months before the Court of Appeals issues its decision.

On October 20, 1997, C.M. moved the Court of Appeals for an Order staying the ALJ Order pending appeal. On October 23, 1997, the Court of Appeals denied that Motion, stating that it should be made first to the Administrative Law Judge. Later that day, C.M. brought the present Motion before the Administrative Law Judge by a telephone conference. The parties were allowed to submit additional argument by facsimile the morning of October 24, 1997. The record was closed upon receipt of those briefs.

In 1997, Minn. Stat. § 244.052, subd. 6(a), was amended to provide that a request for a review hearing before an administrative law judge of a risk assessment level would not delay the notification process "unless the administrative law judge orders otherwise for good cause shown." Laws of Minnesota of 1997, Ch. 239, Art. 5, § 7. Minn. Stat. § 14.65 provides that the filing of a *writ of certiorari* shall not stay the enforcement of the agency decision, but the agency may do so, or the Court of Appeals may order a stay upon such terms as it deems proper. Under Minn. Stat. § 244.052, subd. 6(c), the decision of the administrative law judge in risk assessment review cases is the final agency decision. In its Order of October 23, 1997, the Court of Appeals denied the Motion to it for an immediate stay, but stated that the Order did not preclude C.M. from seeking a stay of the agency decision. Thus, the Administrative Law Judge has jurisdiction to consider the Motion for a stay.

C.M. is about to be released from a residential facility after completing his sentence for a 1993 crime. During that crime, C.M., while drunk, forced his way into the apartment of a former girlfriend after she had thrown him out. Later that night, he entered her bedroom and forcibly sexually assaulted her against her will. C.M. has consistently claimed that she consented to the sex. C.M. was charged with burglary, three counts of criminal sexual conduct and criminal damage to property. Ultimately, he entered a plea of guilty to a reduced charge of burglary in the second degree and the remaining counts were dismissed. C.M.'s criminal record includes a felony gross sexual imposition conviction in North Dakota, a number of assaults, and several burglary and theft convictions in North Dakota and Minnesota. He has a serious alcohol and chemical use problem upon which he blames his criminal behavior. It is reflected in his driving record. He has been assigned to several treatment programs for his chemical dependency, but apparently has not been successful in completing any of them.

In the opinion of the Department of Corrections' psychologist assigned to the case and the End of Confinement Review Committee, C.M. remains a high risk to reoffend due to his history of assaultive behavior, the linkage between substance abuse and his criminal conduct, his failure to complete chemical dependency treatment, and his failure to complete comprehensive sex offender treatment. The Administrative Law Judge agrees and upheld the determination of the ECRC that C.M. be assessed as Risk Level III.

C.M. is raising a number of issues on appeal, most of which involve the validity of various provisions of Minn. Stat. § 244.052. There apparently is also an argument that the evidence was not sufficient to demonstrate that he was at a high risk to reoffend.

The statutes cited above provide no standard for granting a delay in notification other than "good cause." It has been suggested that the standards for issuance of a stay are the same standards that apply to the issuance of a temporary injunction. In ***Dahlberg Brothers, Inc. v. Ford Motor Co***., 137 N.W.2d 314, 321-22 (Minn. 1965), five factors were identified to consider in determining whether to grant temporary injunctive relief:

1. The nature and background of the relationship between the parties,

2. The relative harm to the parties,

3. The likelihood of one party or the other prevailing on the merits,

4. The aspects of the fact situation that require consideration of the public policy expressed in the statutes,

5. The administrative burdens involved in supervising and enforcing a temporary decree.

The parties agree that the factors of balancing the harm, determining the likelihood of prevailing, and evaluating public policy are particularly relevant in this matter.

Balancing the potential harm is difficult. If community notification is given for Risk Level III, the law enforcement agency in the community C.M. intends to live in will be notified (they already have been), agencies and organizations serving people likely to be victims of C.M. will be notified, and the community at large will be notified. C.M. suggests that this community notification will be injurious to him, expose him to public ridicule and attack, and jeopardize the job he has been working at recently without any problems. The ECRC calls this potential harm purely speculative. However, in ***Doe v. LaFleur***, Report and Recommendation of Magistrate Judge, Case No. CV 97-1936 (D. Minn. September 12, 1997), Magistrate Judge Franklin Noel found that similar allegations by the plaintiff there established that he would suffer irreparable harm and, conversely, determined that whether the public would suffer any harm if Risk Level III notification was not given was too speculative to decide. The Administrative Law Judge declines to follow this decision for several reasons. First, the Legislature has determined that community notification consistent with the risk level presented is necessary in order to allow potential victims to protect themselves. In effect, the

legislature has already performed the balancing of harms and determined that appropriate notification should be given.

In this particular case, C.M. is violent and has, on at least two occasions, forced sex upon dates or girlfriends when drunk or high. (The facts surrounding the North Dakota incident are not fresh in the Administrative Law Judge's mind, but, to the best of my recollection and without the record before me, the matter involved a 19 year-old woman with whom C.M. was acquainted. He was also quite young at that time.) Thus, C.M.'s most likely pattern of reoffense, if it follows his previous pattern, would be rape of an acquaintance while drunk. Some of the comments he reportedly made to the 1993 victim indicate that he does not accept the right of a woman to say no to sex and that he is indeed likely to rape another woman if he determines he wants sex and she doesn't. Thus, the harm to the public from not notifying women of his pattern of behavior is great.

C.M. has little likelihood of prevailing on the merits of his arguments before the Court of Appeals. It seems unlikely that his due process challenges to Minn. Stat. § 244.052, the Community Notification Act, will prevail. He claims to have a liberty or privacy interest that is affected by the notification and therefore requires full due process. However, the notification being made is of already public information. (Of course, such information is not usually disclosed in a public presentation and most people simply remain ignorant of the facts.) Moreover, the Community Notification Act provides adequate due process and C.M. in this particular case was accorded adequate due process. The procedures established in the statute and applied in this case provided C.M. with a full opportunity to participate in the process, to require the ECRC to make a reasoned determination based upon reliable evidence, to present evidence and argument, and to have the matter decided by an independent tribunal.

One circuit court has decided that placing the burden of persuasion upon the offender to prove that the initial determination is erroneous is unconstitutional. ***E.B. v. Verniero***, 119 F.3d 1077 (3rd Cir. 1977). It appears unlikely that the Minnesota courts would follow that holding because it was based upon a balancing of the harms to the offender and to the public which that court weighed in favor of the offender. For the reasons already stated, that balancing should weigh in favor of the potential victims. Moreover, this particular case did not turn upon the burdens of proof and persuasion. The findings were made based upon a preponderance of the evidence. There were no findings or conclusions that were so close as to require that they be decided based upon a failure to carry the burden of proof or the burden of persuasion.

In this case, the public interest is best served by providing notice to the public of the type appropriate for a Risk Level III offender. The Administrative Law Judge considered temporarily reducing the notification to Risk Level II accompanied by conditions that would require C.M.'s parole agent to closely monitor his sobriety and provide some type of notification to potential girlfriends. However, by his past conduct, C.M. has demonstrated that he is not likely to remain sober and such conditions would be difficult to administer. If C.M. completes appropriate dependency and sex offender programs, the risk may be reduced in the future. But he is at a high level of risk to reoffend right now. Waiting five to eight months to notify women in the community puts those women at high risk.

Having considered all the foregoing factors, C.M.'s Motion for a stay of community notification must be denied.

S.M.M.